## MEMORANDUM ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

WATER RIGHTS SALT LAKE

RECEIVED

TO:

Norman Johnson, Assistant Attorney General / DNR

Jerry D. Olds, State Engineer

Lee H. Sim, Assistant State Engineer – Distribution

FROM:

Kerry Carpenter, Southwestern Region Engineer

DATE:

13 November 2002

RE:

Water Right 85-250 / "Duck Pond Spring Area"

The subject water right and related pond have been the source of ongoing contention and dispute for an extended period of time. Correspondence directly related to this right goes back to 1992, and more recently acquired documents track the dispute back to 1952. The recent drought has aggravated the problem and the several water users downstream of the subject right are demanding action to defend their rights and threatening litigation if they are dissatisfied with the response<sup>1</sup>. For background, I refer you to several items of correspondence you will find on file 85-250 and which document my recent attempts to evaluate and resolve this issue.

Claim 85-250 is for supplemental stockwatering directly on a "spring area" located in the Skutumpah area on the headwaters of Johnson Creek in Kane County (Section 4, T41S, R4½W, SLB&M). The claim first originated with the filing of a Statement of Water User's Claim in the General Adjudication on 9 September 1969. The claim is based on diligence, but no formal diligence claim form was filed – as was apparently a common practice in that era. The claim was listed in the Proposed Determination at page 75 as a seasonal (April 1 through December 31) supplemental stockwatering right (200 ELU under eight rights, each right representing a specific source). The claim was mapped on Sheet 13d of the hydrographic survey maps.

To my knowledge, there were no objections filed against any of these supplemental claims in the adjudication although the predecessors of the current complainants had protested two previous efforts to appropriate water in this area: Application No. A23525 filed 23 January 1952, and Application No. A29791 filed 18 March 1958. Because both applications were rejected, it appears that they were never assigned water right numbers, so I could find no record of the prior filings. Copies of the Memorandum Decisions rejecting these two filings were recently provided to me by Ramon Bunting. Ramon's father, Finley Bunting, had protested both applications and these documents were found in his personal papers. You may find additional related documents in SLC. If so, these additional documents could help resolve the dispute as to whether the currently existing reservoir is, in fact, the reservoir proposed and denied in the referenced applications to appropriate. The complainants believe they are one and the same, but I have insufficient information to make that determination.

<sup>&</sup>lt;sup>1</sup>Although several parties have participated in recent efforts to resolve the dispute, the parties currently forcing the issue are Ramon & Gary Bunting and Bruce & DeRalph Bunting. The Bunting's are asserting that the past and current practices of water use under 85-250 are impairing prior stockwatering rights on which they rely downstream of the spring area/pond at issue.

The disputed issue can be summarized in this question: What are the rights and limitations related to the impoundment and storage of water in the so-called "Duck Pond reservoir?"

For your reference, I am attaching the following documents:

- 1) A copy of the WUC filed in the General Adjudication for 85-250;
- 2) Copies of pages 74 and 75 from the Proposed Determination showing claim 85-250 (page 75) and claim 85-248 (page 74) which is referenced "For claims used and purpose described. . ." under 85-250;
- A copy of a portion of Hydrographic Survey Sheet 13d showing the manner in which claims 85-248 through 85-251, 81-253 and 85-254 were mapped and on which I have sketched the approximate location of the disputed pond as located in a GPS survey I conducted earlier this year (see attachment 4), below, and file 85-250).
- 4) A copy of a map entitled "Results of GPS Survey Conducted 25 April 2002 RE: WR No. 85-250" on which I have outlined the "Duck Pond Spring Area" as mapped in the hydrographic survey (see attachment 3), above).

The discrepancy between the mapped location for "Duck Pond Spring Area" and the location of the pond I surveyed leads me to conclude that either a) the original mapping of 85-250 was in error, or b) 85-250 was correctly mapped and the disputed pond actually impounds water from the two springs called Skutum Spring #1 (85-248) and Skutum Spring #2 (85-249), both rights supplemental to 85-250. I lean toward the latter conclusion as most likely in that attachment 4) does show a dark area which fits reasonably well the mapped "spring area" shown in attachment 3).

In either case, the issues in dispute are not substantially changed. The potentially significant difference relates to the periods of use defined. Both 85-248 and 85-249 list full year use while 85-250 lists a seasonal use. I will address the import of this difference in the following discussion.

One other significant point related to the adjudication documents: There is no clearly defined impoundment shown on the map and the subject WUC's do not describe any impoundment or storage of water. However, the prior owners of the land and rights<sup>2</sup> insist that the pond has existed in essentially its present condition for nearly 50 years (see correspondence on 85-250 for details of these assertions). The complainants dispute these assertions and insist that the pond

<sup>&</sup>lt;sup>2</sup>The prior owners referenced include Jeffrey Johnson who claims to have owned the ranch since 1978-79 (legal title was not transferred until 1991), and David Robinson whose father, J. Graydon Robinson, filed the WUC's in 1969, as well as the rejected Application to Appropriate No. A29791 in 1958. The current owner, TLB, Ltd., has held title since May, 2002, and has been provided copies of all correspondence to date. It is my understanding that TLB is prepared to continue to defend the position of the prior owners as well as argue that the pond functions to benefit downstream water users.

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has been constructed and/or substantially enlarged in the past 15-20 years subsequent to the adjudication. While it is not conclusive, I note that the disputed pond <u>does not</u> appear on the 1966 version of the USGS quadrangle "Skutumpah Creek" which is based on 1964 aerial photography.

In a meeting with Bruce Bunting et ux. and Ramon Bunting et ux. on 30 October 2002, I verbally committed to prepare this memorandum and to specifically pose to the State Engineer and his legal counsel in the AG's office the following two questions:

- Assuming that some amount of impoundment or storage is necessary to exercise the right to water livestock, what is a "reasonable" amount of storage for the defined use?
- If the allowed period of use is limited to April 1 through December 31 (as in all supplemental rights except 85-248 and 85-249), does this allow for *any* storage of water outside the allowed period of use?

I explained to the Bunting's that this inquiry would be a protected communication considering the threat of litigation. However, if warranted by your response, I also committed that a letter would be sent to the current owner and the complainants setting forth the State Engineer's opinion of the limitations of the subject rights, especially as related to the storage of water in the disputed impoundment.

As you see from the second question, the period of use issue is pertinent. I suspect that the year-around use defined for 85-248 and 85-249 (all other claims list the seasonal period of use) may have been a clerical error carried over from the year-around domestic use under 85-249. Or, it may have been an intentional reflection of the ability to use stored water under these two rights when the other six sources were frozen up. To my knowledge, livestock are not routinely wintered on the Skutumpah Terrace (Elev. 6000' MSL) but probably could be.

With the submission of this memorandum to you gentlemen, I have fulfilled my first stated commitment to the complainants. My ability to fulfill my second commitment will depend upon your response and guidance. Regardless of the position we may take on the dispute, I believe it is quite likely that the parties will end up in litigation and we will be involved at some point in defense of our position.

# IN THE SIXTH JUDICIAL DISTRICT COURT, IN AND FOR THE COUNTY OF WAYNE STATE OF UTAH

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CODE NO.	SERIAL NO.
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ction with the adjudication is be answered fully, an	on of water rights on the above mentioned d d one copy of this form must be filed with	information called for herein will be used in con- lrainage area. All questions applicable to your claim the Clerk of the District Court at
		e of service of the attached Notice. A copy shall be
	e District Court within the time stated will i	file the attached Statement of the Water User's forever bar and estop you from asserting any right
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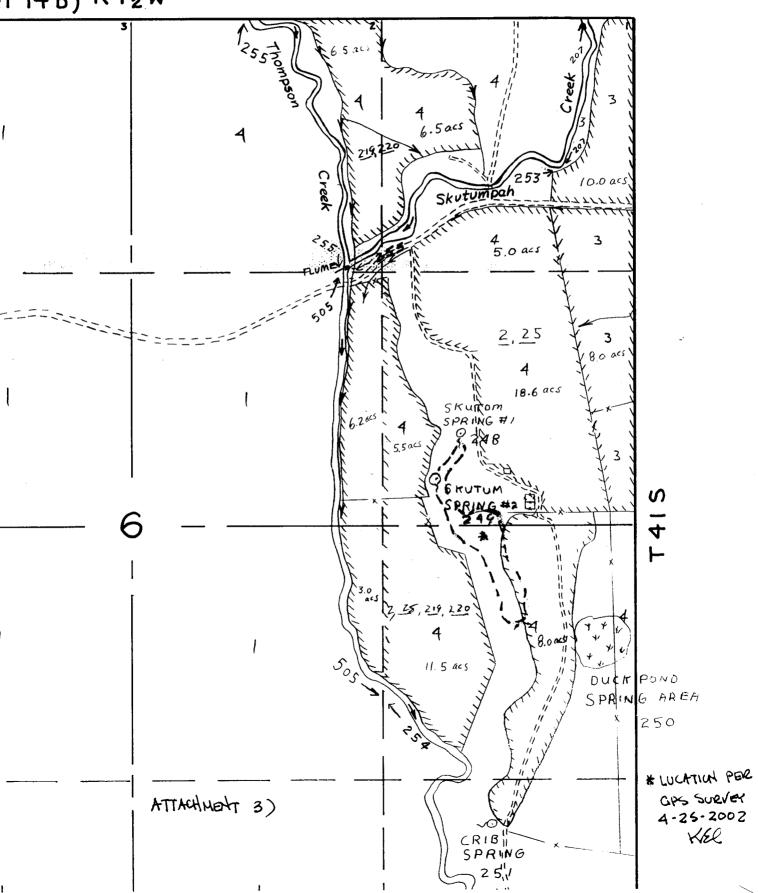
NOTARY PUBLIC	
	15
aimant, that he has read the foregoing statement of claim and knows the contents thereof, and that he has signed the name said claimant to said statement, that the answers set forth therein are true to his best knowledge and belief.	
being first duly sworn, upon oath deposes and says that he is the	
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Type of pump	
Diameter of drain Length of tunnel	
(b) Underground water diverting works: Is well flowing or pump.  Depth of well.  Diameter of well.  Diameter of well.	
(a) Surface water diverting dam, machine compose of Max, width at bottom. Max, width	
Diverting Works: (a) Surface water diverting dam: Material composed of Max width	· <b>þ</b> 1
carrying capacity in sec. ft	
year 1s reservoir used for equalizing purposes. If feeder canal is used, give maximum	
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(d) Period of Storage from	
Completed	
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(b) Location of reservoir by regar subdivisions described by Location commenced	
(a) Name of reservoir (b) Location of reservoir by legal subdivisions described by 40-acre tracts	
Appropriation for Storage Purposes:	13.
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(s) Nature of Use	
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Where water is used for Municipal Purposes:	1.1

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27	Diligence 1 1864 2 312 cfs	Diligence 1864 0.312 cfs	n Diligence 1864	Rey X.	Diligence	TYPE OF RIGHT PRIORITY FLOW
	Skutum Spring No. 2 Stock water directly on spring located in the SE%NE%, Sec. 6, T41S, R4%W, SLBM.	Skutum Spring No. 1 Stock water directly on spring located in SE%NE%, Sec. 6, T41S, R4%W, SLBM.	Thompson Creek  Stock water directly on stream from point where stream enters Lot 2 (NWXNEX), Sec. 6, T41S, R4%W, SLBM, to point of stream's confluence with Mill Creek to form Skutumpah Canyon Creek in Lot 2 (NWXNEX Sec. 6, T41S, R4%W, SLBM.	W. 420 ft. from the NE cor., Sec. 6, T41S, R5W, SLBM in Lot 1. (NE%NE%), Sec. 6, T41S, R4%W, SLBM, to point of stream's confluence with Thompson Creek to form Skutumpah Canyon Creek in Lot 2 (NW%NE%, Sec. 6, T41S, R4%W, SLBM.	Mill Creek  Stock water directly on stream	SOURCE POINT OF DIVERSION
Domestic: One Family SEE CLAIMS USED FOR PURPOSE DESCRIBED	Stockwatering: 200 cattle SEE CLAIMS USED FOR PURPOSE DESCRIBED	Stockwatering: 200 cattle SEE CLAIMS USED FOR PURPOSE DESCRIBED	Stockwatering: 200 cattle SEE CLAIMS USED FOR PURPOSE DESCRIBED		Stockwatering: 200 cattle SEE CLAIMS USED FOR PURPOSE	PURPOSE AND PLACE OF USE
Jan. 1 to Dec. 31 249	Jan. 1 to Dec. 31 For claims used for purpose described see Water User's Claim 248, page 74	Jan. 1 to Dec. 31 248, 249, 250, 251, 252, 253, 254, 255	April 1 to Dec. 31 For claims used for purpose described see Water User's Claim 248, page 74	see Water User's Claim 248, page 74.	April 1 to Dec. 31 For claims used for	PERIOD OF USE CLAIMS USED FOR PURPOSE DESCRIBED
0.73 acft.	•	•	•		•	ANNUAL WATER ALLOWED
	*Diversion any, each or all claims. Total yearly diversion under all claims mentioned 5.60 acft.	*Diversion any, each or all claims. Total yearly diversion under all claims mentioned 5.60 acft.	*Diversion any, each or all claims. Total yearly diversion under all claims mentioned 5.60 acft.		*Diversion any, each or all claims. Total yearly diversion under all claims mentioned 5.60 acft.	REMARKS

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Jahnson!	Accord According to Graydon Bobinson P. O. Box 133 Kanab, Utah 84741 Map No. 13d Pefferen & Mary #.	Heron Rubinson  J. Graydon Robinson  P. O. Box 133  Kanab, Utah 84741  Map No. 13d  (Herry & Marty F  Reference States St	United States of America Bureau of Land Management Kanab, Utah 84741 Map No. 13d	Harris & Wary &  Map 13d  Map 13d	NAME AND ADDRESS INTEREST MAP NUMBER
	Diligence 1864 0.022 cfs	Diligence 1864	Diligence 1864	Diligence 1864 0.022 cfs	TYPE OF RIGHT PRIORITY FLOW
	Crib Spring  Stock water directly on spring located in the SE%SE%, Sec. 6, T41S, R4%W, SLBM.	Skutumpah Canyon Creek Stock water directly on stream from point where stream enters NE%SE%, Sec. 6, T41S, R4½W, SLBM, to point where stream leaves SE%SE%, Sec. 6, T41S, R4½W, SLBM.	Skutumpah Canyon Creek Stock water directly on stream from point where stream enters SWWNE'X, Sec. 6, T41S, R4½W, SLBM, to point where stream leaves NWYXSE'X, Sec. 6, T41S, R4½W, SLBM.	Duck Pond Spring Area Stock water directly on spring area located in the NE%SE%, Sec. 6, T41S, R4%W, SLBM.	SOURCE POINT OF DIVERSION
	Stockwatering: 200 cattle SEE CLAIMS USED FOR PURPOSE DESCRIBED	Stockwatering: 200 cattle SEE CLAIMS USED FOR PURPOSE DESCRIBED	Stockwatering: 69 cattle Graydon Robinson Allotment SEE CLAIMS USED FOR PURPOSE DESCRIBED	Stockwatering: 200 cattle SEE CLAIMS USED FOR PURPOSE DESCRIBED	PURPOSE AND PLACE OF USE
•	April 1 to Dec. 31 For claims used for purpose described see Water User's Claim 248, page 74.	April 1 to Dec. 31 For claims used for purpose described see Water User's Claim No. 248, p. 74	May 1 to Feb. 28 For claims used for purpose described see Water User's Claim 120, page 76.	April 1 to Dec. 31  For claims used for purpose described see Water User's Claim 248, page 74.	PERIOD OF USE CLAIMS USED FOR PURPOSE DESCRIBED
	•	•	•	•	ANNUAL WATER ALLOWED
	*Diversion any, each or all claims. To yearly diversion under all claims men 5.60 acft.	*Diversion any, each or all claims. To yearly diversion under all claims ments 5.60 acft.	*Diversion any, each or all claims. To yearly diversion under all claims ments 1.93 acft.	*Diversion any, each or all claims. Topy yearly diversion under all claims ments 5.60 acft.	REMARKS
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HYDROGRAPHIC SURVEY
KANAB-JOHNSON CREEK, KANE CO.
SHEET 13d

t 14b) R42W



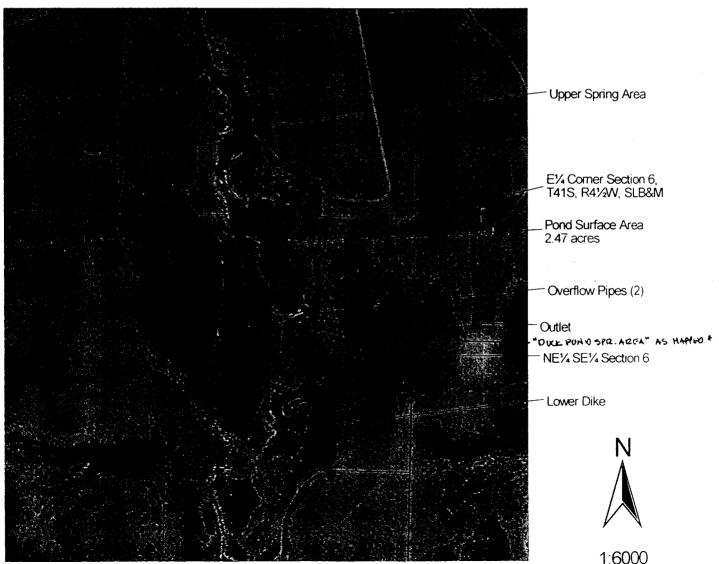
# NE1/4 SE1/4

Section 6, T41S, R41/2W, SLB&M 1:24000

## Results of G<sub>1</sub> S Survey Conducted 25 April 2002 RE: WR No. 85-250

### NOTES:

- 1. At time of survey, pond appeared to be approximately 2' below maximum / overflow elevation.
- 2. Pond surface area shown is somewhat enlarged because GPS receiver could not be carried directly over water's edge.
- 3. Survey performed by Kerry Carpenter, SW Region Office, Utah Division of Water Rights.
- 4. Underlying Photo taken from USGS Photo Ortho Quad SKUTUMPAH CREEK, UTAH,



ATTACHHENT 4)

\* Hypeocenetic scener shar 182